APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,181

JACKSONVILLE BROADCASTING CORPORATION, *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

FLORIDA-GEORGIA TELEVISION CORPORATION, INC., *Intervenor*

Appeal from a Decision of the Federal Communications Commission

Decided May 6, 1965

Before FAHY, *Circuit Judge,* BASTIAN, *Senior Circuit Judge,* and BURGER, *Circuit Judge.*

FAHY, *Circuit Judge,* and BASTIAN, *Senior Circuit Judge:* This is an appeal by Jacksonville Broadcasting Corporation (JBC) from a decision of the Federal Communications Commission reaffirming prior grants of a construction permit and television station licenses to Florida-Georgia Television Company, Inc., the intervenor, to operate on Channel 12 in Jacksonville, Florida, and finding JBC to be disqualified from consideration.

The case was commenced in 1952 by appellant in filing an application for a construction permit for a new television broadcast station on the channel. Competing applications were filed by the City of Jacksonville and by Florida-Georgia. The Commission designated the three applications as mutually exclusive and provided for a consolidated proceeding. The hearing examiner on April 4, 1955, released an Initial Decision proposing to award the construction permit to JBC. Exceptions were filed by the

two other applicants and the case was heard by the Commission on February 6, 1956. In August of that year the Commission released its final decision, granting the application of Florida-Georgia and denying the applications of JBC and the City of Jacksonville. JBC filed a petition for rehearing and reconsideration, which was denied by the Commission on August 1, 1957. No appeal was taken from the Commission's final decision. On September 20, 1957, the Commission granted a license to Florida-Georgia and a modified license on May 22, 1959.

On August 2, 1960, the Commission by order reopened the record to determine whether the award to Florida-Georgia should be set aside as void or voidable and whether any of the parties to the proceeding should be disqualified by reason of misconduct. This action of the Commission was the result of testimony taken before the Subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce, House of Representatives, from which it appeared that *ex parte* presentations had been made by one or more of the applicants in connection with the award of the permit in question. The Commission designated the following issues for further hearing:[1]

1. To determine whether any of the members of the Commission who participated should have disqualified himself from voting in the proceedings before the Commission which resulted in the award of a construction permit for a television station on Channel 12 in Jacksonville.
2. To determine whether any person or persons influenced or attempted to influence any member of the Commission with respect to the proceedings resulting in the award of the construction permit for Channel 12, Jacksonville, in any manner whatsoever except by the recognized and public processes of adjudication.

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[1] The Commission appointed the Chief Hearing Examiner as presiding officer of the hearings. Later, the parties agreed that he would be assisted in the preparation of his report by Hearing Examiner Chester F. Naumowicz, Jr.

3. To determine whether any party to the proceedings before the Commission which resulted in the award of the construction permit for Channel 12 in Jacksonville directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings.
4. To determine, in the light of the facts adduced upon the foregoing issues, whether the grant heretofore made of a construction permit for Channel 12, Jacksonville, was void *ab initio* and if not, whether such grant is voidable and action should be taken to set it aside; whether any of the applicants in this proceeding was and is disqualified to receive a grant of its application; and whether the conduct of any applicant, if not of a disqualifying character, has been such as to reflect adversely upon such applicant from a comparative standpoint.

All applicants in the original proceeding were permitted to participate as parties in the reopened proceeding, and opportunity was provided to any persons against whom evidence might be received to cross-examine and to submit rebuttal testimony. The Attorney General of the United States was permitted to participate as *amicus curiae*.

On April 11, 1962, the hearing examiners released their Initial Decision, holding that former Commissioner Richard A. Mack should have disqualified himself from participating in the original decision because of his *ex parte* discussions of the merits of the competing applicants while the original proceeding was pending before the Commission; further, that the City of Jacksonville and JBC should be disqualified from further consideration because of attempts made by persons identified with those parties to influence the Commission; and that Florida-Georgia was not shown by the evidence to be disqualified. By reason of Commissioner Mack's conduct, the original decision of August 31, 1956, was held to be void *ab initio* and the grant then made to Florida-Georgia was set aside.

However, in view of the fact that they found no impropriety to have been committed by Florida-Georgia, the examiners held that the public interest, convenience and necessity would be served by authorizing the continued operation of the television station by Florida-Georgia pending final disposition by the Commission.[2]

Appeal was taken to the full Commission, which, on September 16, 1963, with the unanimous vote of the four Commissioners voting, note 2, *supra,* released its final order. The Commission adopted most of the hearing examiners' conclusions, disagreeing, however, with the disqualification of the City of Jacksonville. But the City has voluntarily withdrawn and its application need not be considered.

The Commission agreed with the examiners that Commissioner Mack should have disqualified himself from the deliberations and decision in the original case and that the original grant to Florida-Georgia was invalid and should be set aside. It also concluded,

> that in any further proceedings to be had in connection with the subject applications, JBC is disqualified from consideration because of attempts by individuals identified with it to influence the Commission through methods outside the recognized and public processes of adjudication. City and Fla-Ga, on the other hand, are not shown by the evidence to be disqualified from further consideration and nothing in this record may be held to reflect adversely on their applications.

Finally, upon a complete review of the entire record, the Commission ordered,

> That the Commission's Decision of August 31, 1956, insofar as it granted a construction permit to Florida-Georgia Television Company, Inc., is *nunc pro tunc*

[2] On the original action of the Commission in 1956, Commissioners Hyde, Doerfer, Lee and Mack voted to adopt the decision; Commissioners McConnaughey and Bartley dissented; Commissioner Craven abstained. On the 1963 order, Commissioners Henry, Hyde, Bartley and Ford voted to adopt the decision; Commissioners Cox and Loevinger did not participate; Commissioner Lee was absent.

> READOPTED; The Commission's grants of station licenses on September 20, 1957 and February 12, 1958 are, *nunc pro tunc*, AFFIRMED; and the application of Florida-Georgia Television Company, Inc., for renewal of television station license for WFGA-TV, Jacksonville, Florida filed November 30, 1960, insofar as it has been continued in a deferred status by reason of the questions raised in this proceeding, Is REMOVED from such deferred status, without prejudice to any other causes for deferral imposed by Commission processes.

I. The order of the Commission disqualifying JBC is affirmed. The evidence of record amply supports the findings of the Commission that this applicant through its President, who was a controlling stockholder and director, in the language of the examiners, adopted by the Commission, sought outside influence,

> to induce the Commission to exercise its ultimate decisional authority to adhere to the original instructions given its staff to prepare a decision upholding the grant contemplated by the Initial Decision of the Hearing Examiner, irrespective of the significance which might be drawn by the Commission from its analysis of the evidence and the exceptions of the competing applicants and oral argument thereon.

We need not go into the details of the substantial evidence to that effect, justifying the finding and conclusion of disqualification. *WKAT, Inc.* v. *Federal Communications Comm'n,* 111 U.S. App. D.C. 253, 261, 296 F.2d 375, 383, *cert. denied,* 368 U.S. 841. The action of the Commission was altogether within its responsibility to administer the statute in the public interest.

II. The Commission contends that its disqualification deprives JBC of standing to contest the grant to Florida-Georgia, though the Commission does not move for dismissal of the appeal. In any event, we think JBC's disqualification does not preclude our review of the grant to Florida-Georgia. JBC had standing to bring the case

here. In considering its appeal from denial of the grant to it, and from the grant to Florida-Georgia, a competitor for the channel, JBC based its case in good part upon its claim that the Commission used a double standard on the issue of disqualification—one as to it and another as to Florida-Georgia. On JBC's appeal we are brought face to face with this and other problems as they bear upon the grant to Florida-Georgia. We are not required to abandon full consideration of these problems at the point where we uphold the Commission in finding JBC disqualified for grant of the channel to it. The whole case is then in process of decision and our review of it may be completed on all issues.

III. Intervenor Florida-Georgia, but not the Commission, would have us dismiss the appeal on a different ground. It points out that in October 1960 JBC undertook to assign to a partnership composed of its stockholders all interest in its application, shortly after which, on December 27, 1960, the corporate JBC was dissolved.[3] During the proceedings before the hearing examiners JBC made known its change in business form by filing a petition to amend its application. The hearing examiners stated that "the Commission itself does intend that the Jacksonville Broadcasting Corporation successors shall participate as respondents here" and that they would "defer action indefinitely on the petition to amend and permit this group now representing Jacksonville Broadcasting Corporation or its successors to participate as respondents in the proceedings." Counsel for Florida-Georgia stated he had no objection to the participation of the JBC group at that time. No further action was taken to change the nature of the appearance of record and the JBC group participated in the hearing, all pleadings being in the name of JBC. When the Initial Decision was rendered, the examiners denied the petition to

[3] The original proceedings had eventuated in 1956 with the award of the permit to construct the station on Channel 12 to Florida-Georgia. JBC participated in those proceedings but did not appeal from that decision. This did not preclude it from participating in the later proceedings if it was properly in them, as we hold to be the case.

amend the application, apparently believing it to be a futility in view of the disqualification of JBC.

After the examiners' decision JBC filed a notice of appearance indicating an intention to participate in oral argument before the full Commission. Florida-Georgia objected on the ground that the corporation had ceased to exist. The Commission declined to rule on the merits of this contention but denied Florida-Georgia's objection, stating:

> Suffice it to say that an entity styling itself "Jacksonville Broadcasting Corporation" has participated in this hearing thus far as a party respondent with the consent of all parties and has duly filed exceptions to the Initial Decision. Such entity, in the interests of a full record, will be permitted to argue such exceptions.

The "entity" continued to participate in the proceedings. When the Commission issued its final decision and order it declined to pass upon the corporation's continued status and related matters, stating that in view of its decision concerning the *ex parte* conduct of JBC it was unnecessary to do so, and since such conduct antedated the application the Commission concluded these questions had become moot. In this posture of the case the Commission affirmed the examiners' denial of JBC's petition to amend its application.

The appeal to this court is by the "entity" which had sought and been denied the right to the amendment but was allowed to press its case in all respects without regard to its internal status. Rather than dismiss its appeal for failure of the Commission to straighten out the matter in better fashion we give JBC the same "entity" status the Commission gave it. In the circumstances presented the relation of this court to the administrative process must be construed as sufficiently accommodating to authorize the court on the appeal of JBC to consider on the merits the decision of the Commission restoring

the grant of the construction permit and licenses to Florida-Georgia, contested by the "entity."[4]

IV. Finding that the *ex parte* representation in favor of Florida-Georgia could not be traced to its principals, or attributed to them, the Commission *nunc pro tunc* readopted the decision in favor of Florida-Georgia, made August 31, 1956, which it had reopened by its order of August 2, 1960. The Commission did not use a different standard with respect to Florida-Georgia from that it used in finding JBC disqualified. The factual situation affecting the two applicants, carefully analyzed by the Commission, was itself different in the important respect that the principals of JBC were responsible for the extrajudicial attempts to influence the Commission, while Florida-Georgia was found not to be responsible for the overtures in its favor. We are not persuaded that this factual decision of the Commission exonerating Florida-Georgia from wrongdoing in the respects here in issue should not be accepted by this court. The Commissioners who participated in this conclusion, note 2, *supra,* upon a careful review of the evidence, were unanimous. We accept their findings under the rule applicable to the scope of our review.

V. We do not agree, however, that the grants to Florida-Georgia should have been restored to their original status. Though Florida-Georgia was not disqualified the decision of August 31, 1956, awarding the construction permit to it, followed in due course by licenses, must be held to have been influenced by the *ex parte* representations made for its benefit, even though the principals of Florida-Georgia were innocent of such representations. Such innocence saves Florida-Georgia's qualification but does not validate grants which are the product, in part at least, of the wrongful influences brought to bear upon the result reached by the Commission in its favor. The original grant of August

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[4] We have considered the contentions that Florida law prohibits the continuation of a corporate body such as JBC after its dissolution for the purposes of obtaining a television license. But without reaching a conclusion on this point we hold for the reasons we give that the motion to dismiss should not be granted.

31, 1956 was invalid by reason of these influences. Apparently the Commission's reason for readopting its original decision was that it thought Florida-Georgia was the only qualified applicant remaining in the case. This fails to take into account the invalidity of the original decision. The public interest cannot be reconciled with leaving in effect grants which on this record we must hold were in significant part the result of extra-judicial representations and influences. In applying the public interest standard the decision that an applicant is not disqualified because innocent of such extra-judicial activities solves only part of the problem. The activities exerted for the benefit of the applicant undermine the validity of the consequent grant to it.

The result is that the present restoration to Florida-Georgia of the construction permit authorized August 31, 1956, and ensuing licenses, must be set aside. Since the decision upon which they rest was originally invalid, the decision and its progeny remained invalid and could not be readopted as valid.

This leaves the channel free to be applied for by any qualified applicant. Jacksonville Broadcasting Corporation, its former officers and directors, the partnership and its members, are excluded because disqualified; but Florida-Georgia is not; for though the existing grant to it must be set aside it has not been disqualified and may compete, but on a completely equal and in no sense a preferred basis, with any other applicant who might apply. *Cf. WORZ* v. *Federal Communications Comm'n*, —— U.S. App. D.C. ——, —— F. 2d ——.

The motion to dismiss the appeal is denied. The order of the Commission is affirmed insofar as it relates to the disqualification of JBC. Insofar as it relates to the qualification of Florida-Georgia the order is also affirmed. The order is set aside insofar as it readopted the Decision of August 31, 1956, and insofar as it affirms the grant of station licenses made September 20, 1957, and February 13, 1958, and renewal of station license for WTBA-TV, November 30, 1960. The case is remanded to the Commission for further proceedings not inconsistent with this opinion.

As authorized in *WORZ, supra*, authority for continued

operation may be granted by the Commission in its discretion pending such further proceedings.

It is so ordered.

BURGER, *Circuit Judge, concurring in part and dissenting in part:* I concur in the majority's treatment of the standing[1] and jurisdiction[2] issues and in their affirmance of Jacksonville Broadcasting's disqualification. And I agree with the broad proposition relied on by my colleagues

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[1] The Commission relies upon our decisions in Simmons v. FCC, 79 U.S.App.D.C. 264, 145 F.2d 578 (1944), and Mansfield Journal Co. v. FCC, 84 U.S.App.D.C. 341, 173 F.2d 646 (1949), for the proposition that Appellant has no standing to raise the propriety of the Commission's failure to disqualify its competitor, Florida-Georgia, if the record contains substantial evidence to support its own disqualification. The latter case is not in point, however, since it held merely that one applicant was not aggrieved by the award of *non*-mutually exclusive authority to another. And *Simmons* is readily distinguishable: There we found that an applicant whose antenna placement would be a hazard to air navigation had no standing to challenge a mutually exclusive award to another, since its own application could not be granted in any event. The clearly correct decision in that case does not automatically govern the present facts. For the instant situation goes to the integrity of the Commission's processes in a fundamental manner. As we said in WKAT, Inc. v. FCC, 111 U.S.App.D.C. 253, 261, 296 F.2d 375, 383, *cert. denied*, 368 U.S. 841 (1961):

> Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding.

The public interest clearly requires Appellant to be permitted this appeal —if for no other reason than the possibility that this court might have concluded to tell the Commission that it must begin all over again from the beginning. When a regulatory agency so far departs from protecting the public interest, some means must be found to ventilate the processes employed.

[2] I do not think that Southwestern Publishing Co. v. FCC, 100 U.S.App. D.C. 251, 243 F.2d 829 (1957), requires a contrary result. We there dismissed an appeal by an injured sub which had not been a party to the litigation conducted by its parent corporation at the Commission. That case involved a real difference in parties not present here.

that our scope of review of Commission action is limited. In observing those limits we are often compelled to affirm agency action on records which could well have led us to a different, even a completely opposite, conclusion. But this case, to me, falls within that narrow area where we ought to reverse Commission action because the very basis of the Commission's choice to disqualify one, while refusing to disqualify the other, of two applicants is untenable because a distinction between the two is without substantial record support. The Commission disqualified the Jacksonville group because of attempted but *unsuccessful* efforts to reach the Commission by ex parte contacts although the bulk of the evidence on this score relied upon by the Commission shows that the objective of these contacts was to urge the Commission to *disregard* political considerations and decide the case on its merits and on the record evidence. I do not challenge the Commission's power to draw their own inferences, even though I might read that evidence as of a less "sinister cast" than they do. What I see as grave error is the use of a double standard in evaluating misconduct.

Using two standards, as I see it, the Commission found no fault in the successful applicant, who is reasonably shown on this record to have been guilty of conduct at least as objectionable as that which disqualified Appellant. I would not try, however, to balance an appraisal of comparative misconduct, but would disqualify *both* applicants; I make comparisons only to illustrate what seems to me the irrationality of the Commission's conclusions and to demonstrate that it employed a double standard of ethics. It is important that this be spelled out.

The Commission's wrath was directed at Jacksonville Broadcasting Corporation in part because to Jacksonville's subsequent knowledge Congressman Herlong called the late Commissioner Mack, his fellow Floridian, to inquire about rumors that political influence was about to lead the Commission to reverse the award to Appellant under the Examiner's preliminary report at that time tentatively approved by the Commission. Congressman Herlong was so disturbed by Mack's ensuing confession of misconduct that he at once

reported the incident to the Chairman of the Committee on Legislative Oversight of the House Interstate and Foreign Commerce Committee. Later, in testifying before the Commission, the Congressman said Commissioner Mack had told him he, Mack, had committed himself to vote for the "Mitch Wolfson" group, Intervenor here, that he had made this commitment before coming to Washington to sit on the case, and that he had to stand by his commitment.

To read sinister implications into Congressman Herlong's actions, which the Congressman promptly made a matter of public record to his colleagues, is at least surprising. I suppose it not unlikely that it was Herlong's disclosures to Congress which led the Commission to recall and reopen the case on its own motion. Mitchell Wolfson, a dominant figure of the Intervenor, who controls three other Commission licensed communications channels,[3] testified that he had not sought or received any ex parte prehearing commitment from Mack. Although the supplemental Commission hearings were held at a time when Commissioner Mack was available, he was not called. The Commission was therefore faced with solid and credible evidence from a member of Congress that he had been told by Mack of an obviously illegal advance commitment to support the Intervenor regardless of the evidence. The only evidence tending to meet this grave accusation was Wolfson's testimony that *he,* Wolfson, had no knowledge of the matter. We are left by the Commission to assume that Mack made this commitment to the Wolfson group without any request—or inducement—from Wolfson or one of his associates. That Wolfson and Mack had contacts with each other is suggested by the "Dear Mitch . . . . Sincerely, Dick" letter in which Mack thanked Wolfson for gifts of "liquid refreshments" and "flowers . . . and delicacies" sent to Commissioner and Mrs. Mack. There is also evidence that various politically prominent Florida personages and Washington lawyers had made known their views to the Commission indirectly in support of Intervenor and in opposition to Appellant. I cannot take seriously any suggestion that this was exclusively the innocent activity of

[3] R. 7133-34.

public spirited citizens with no "ax to grind" after the sordid history of this case had become well known to Congress and the public. Indeed the Office of the General Counsel of the Commission, after detailed analysis of the evidence developed at the reopening hearing, concluded that principals of Florida-Georgia were "inextricably" involved in these activities and accordingly recommended Florida-Georgia's disqualification to the Commission. See Reply Brief for Appellant, pp. 2-3.

It has been rare for this court in its holdings, or even for individual members in dissent, to undertake re-examination of the weight of evidence before the Commission, and this process has been generally limited to situations where applicants engaged in grossly improper activities in pursuit of their applications. (See, e.g., *Massachusetts Bay Telecasters* v. *FCC,* 104 U.S.App.D.C. 226, 261 F. 2d 55 (1958); *WORZ, Inc.* v. *FCC,* 106 U.S.App.D.C. 14, 268 F. 2d 889 (1959), and other remand cases). But here the Commission has made a finding that one applicant is disqualified while another is given a "clean bill" in the face of evidence of ex parte contacts by the successful party at least as offensive as—and in my view worse than—those penalized by the Commission. My conclusions on "comparative misconduct" are not based on a re-evaluation of credibility of witnesses, for appellate judges are not free to engage in such excursions; credibility is for fact finders. Rather my conclusions rest on undisputed evidence; this is highlighted by the failure of the Commission even to ask Commissioner Mack for his version of the conversation with Herlong or whether he had been approached by anyone for the Wolfson group. The testimony of Congressman Herlong as to Commissioner Mack's statements to him stands unchallenged; the Commission did not in any way cast doubt on Herlong's testimony.[4] Mitchell Wolfson's

[4] The Commission neatly disposed of Mack's statement to Herlong by saying, "Commissioner Mack's statement to Congressman Herlong forms the basis of a finding only that he made the statement, and not as to its accuracy. With respect to Wolfson and Florida-Georgia, the statement is hearsay and incompetent to form the basis of a finding of fact." What astonishing sophistry! Indeed what impertinence! As a matter of technical evidence law, of course, Mack's statement would be admissible *against*

testimony can do no more than afford a basis for a finding —if he was believed—that he, *Wolfson,* secured no ex parte commitment from Mack. The circuitous methods of those who engage in backdoor communications with the Commission are all too familiar to us and the Commission's failure even to invite Mack to clear up this grave charge, which goes to the very heart of the disputed issue here, casts an indelible shadow over the entire process.

I repeat that I would not venture to balance the misconduct of Appellant against that of Intervenor for the purpose of giving the award to Appellant rather than Intervenor. But I can find no record basis for the Commission to hold that the rather bumbling and naive efforts of Appellant to find out who was "undermining its award" was evil beyond redemption, while Intervenor was blameless. Under a single standard of conduct both Appellant and Intervenor—or neither—should have been disqualified.

I would remand to the Commission with directions to vacate its award to the Intervenor and begin anew with both Intervenor and Appellant disqualified along with all shareholders of either who hold a substantial amount of stock. Only by such a process can we cleanse this award of its long and unsavory background.

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him as a party admission, were he a litigant, but inadmissible (except in some jurisdictions) *against others* as not strictly a common-law "declaration against interest."

But the Commission is not bound by such nice evidentiary distinctions and indeed does not ordinarily stand on them; it is permitted—in fact *required* in the public interest—to consider reliable evidence which might be inadmissible in court. The statement attributed to Mack was quickly made a matter of public record by a member of the United States Congress whose version was not shaken by cross-examination at the Commission hearings. And certainly Mack's statement—amounting to a confession of misconduct on his part made to a close acquaintance—was not one to be lightly made. I am not impressed by the suggestion made by counsel for Intervenor at the hearings and adopted in the Commission's brief before us that Mack told a "little white lie" in order to be rid of an annoying phone call. Rubbish! Even if the Commission's hypersensitivity concerning hearsay could justify its refusal to give any weight to the Herlong-Mack incident as against Intervenor, its zeal for strict evidentiary niceties cannot excuse its failure to pursue the subject further by calling upon Mack for an explanation. Mack presumably did not make a commitment to the birds in the trees but to flesh and blood men.

APPENDIX B

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Docket No. 10833 File No. BPCT—749

In re Applications of

CITY OF JACKSONVILLE, JACKSONVILLE, FLA.

Docket No. 10834 File No. BPCT—1624

FLORIDA-GEORGIA TELEVISION CO., INC., JACKSONVILLE, FLA.

Docket No. 10835 File No. BPCT—1625

JACKSONVILLE BROADCASTING CORP., JACKSONVILLE, FLA.

For Construction Permits for New Television Stations
(Channel 12)

DECISION

(Adopted September 11, 1963)

BY THE COMMISSION: COMMISSIONER LEE ABSENT;
COMMISSIONERS COX AND LOEVINGER NOT PARTICIPATING

PRELIMINARY STATEMENT

1. The history of this proceeding is set forth in paragraphs 1 and 2 of the initial decision of Hearing Examiners James D. Cunningham and Chester F. Naumowicz, Jr. (FCC 62D—34; mimeo No. 18568), released April 11, 1962, and will not be repeated. Briefly stated, the hearing was concerned with alleged ex parte conduct for and on behalf of the three parties named in the caption hereof in a 1954-56 comparative proceeding looking to the award of channel 12 in Jacksonville, Fla. In a hearing conducted in 1961, the hearing examiners found, concluded, and decided that the city of Jacksonville (City) by and through one of its commissioners had employed an attorney to make ex parte contacts and must therefore be held disqualified. It was fur-

ther held that Jacksonville Broadcasting Corp. (JBC) had likewise disqualified itself by making and attempting to make ex parte approaches to influence the Commission. As to Florida-Georgia Television Co., Inc. (Fla-Ga), the examiners found no evidence meriting an adverse conclusion concerning it. Nevertheless, the grant was held void ab initio by reason of the disqualification of Commissioner Mack for misconduct on his own part. Following release of the initial decision, exceptions and briefs were filed by the Office of General Counsel, Federal Communications Commission (OGC), JBC, and City. A statement in support, exceptions, and brief was filed by Fla-Ga. Replies were filed by all parties. Oral argument was held on February 14, 1963.

2. A motion to reopen record conditioned upon the actions of the Commission in evaluating the evidence was filed after initial decision by OGC on June 13, 1962, and an opposition thereto was filed by Fla-Ga. Motions requesting correction of transcript were filed on March 1, 1963, by JBC and City. A petition to accept motion requesting correction of transcript was filed by Fla-Ga on March 14, 1963, and a motion was concurrently lodged.[1]

Findings of Fact

We have examined the initial decision in the light of the record, the exceptions and briefs, and the arguments of the parties. Our rulings on exceptions are contained in the appendix hereto. Except as modified by such rulings, we adopt the examiners' findings of fact and incorporate them by reference as fully as if set forth at length herein.

Discussion

1. We shall first consider the motion to reopen record filed by OGC. In the course of this proceeding, a number

[1] The Commission being of the opinion that the corrections are proper, the ordering clauses will provide for corrections. We have likewise examined Fla-Ga's petition to accept late filing of the motion to correct transcript and, good cause having been shown, the relief requested will be granted. We have also examined Fla-Ga's motion to correct transcript, find it proper, and shall dispose of same in the ordering clauses.

of items of evidence were introduced concerning the admissibility of which there existed wide differences of opinion; e.g., the so-called "Mack Diary" (see I.D., footnote 15) and a memorandum from the files of Senator Spessard Holland of Florida (see I.D., finding 19(b) and footnote 18). In the text of the initial decision (par. 3 and footnote 2), the examiners discussed the desirability of striking certain evidence which they deemed nonprobative vis-a-vis permitting it to remain in the record and evaluating it for what they considered it to be worth. The technique adopted by the examiners was to permit such evidence to remain in the record, but to "ignore" an unspecified portion of it. OGC's motion was directed to reopening the record for the purpose of adducing the personal testimony of certain persons whose affidavits and the like OGC believed were ignored. The motion is not well founded. While we do not approve of indefinite comments on the quality of the evidence as made by the hearing examiners, believing it to be the better practice to comment and rule more specifically, the fact remains that the examiners did not strike such evidence from the record. It remained therein, available for our examination and we have examined it as set forth by our discussion in paragraph 2 below. OGC's motion is based on the premise that such evidence was stricken. Such not being the case, the motion will be denied and the ordering clause will so provide.

2. Considerable discussion during these proceedings was occasioned by the Federal "shopbook rule" (28 U.S.C. 1732). The problem may be summarized to the effect that (*a*) if certain records in the offices of former Commissioner Mack and U.S. Senator Spessard Holland of Florida (for example) were to be admitted in evidence, and (*b*) were to be accorded full credit for the recitals therein, (*c*) they would have established that persons (e.g., Foley, Spades, Simmons, etc.) having business or social relations with the principals of Fla-Ga had made contacts with the officials named in connection with the original comparative proceedings. Such contacts, in turn, might have been argued to have been of an improper ex parte nature. Had this conclusion been reached, it might have been further argued that

such contacts were known to, instigated by, or ratified by, the principals of Fla-Ga. From this state of affairs, conclusions adverse to Fla-Ga might have been drawn. With this argument in mind, we have scrupulously reexamined the material purportedly falling within the shopbook rule. We find that two areas of confusion prevailed in the proceeding before the hearing examiner—admissibility and weight. In our view since the Holland and Mack office records were maintained in the regular course of business, we hold that they were shopbooks and entitled to be admitted in evidence. A more difficult question is presented with respect to the weight to be accorded these entries. The extract from the office records of Senator Holland, no matter how regularly made, cannot be accorded any weight because the person who made the entry testified that he did not recognize Simmons' voice. Therefore, the most that the entry proves is that a person calling himself "Simmons" called Senator Holland's office. See Wigmore, *Evidence,* third ed., No. 2155. Contradicted by the testimony of Simmons himself, we cannot find that Simmons made such a call. The "Mack diary" entries, we find similarly trustworthy to prove that Foley and Spades made various visits to former Commissioner Mack's office. Indeed, except for vagueness as to dates, neither took issue with the fact that they were at the office on given dates. To the "purpose" column of the diary (i.e., that portion purporting to show the purpose of the visit or what was discussed), we can accord no weight. Testimony (e.g., FCC exhibit 83) clearly shows that the purpose entries were mainly educated guesses as to what the visitor called about, based on statements of the visitors, their business interests as generally known to the recorder, the subject matter of other visits, statements by third parties, etc.—which lend no reliability to the accuracy or correctness of the entries. When to this is added the fact that a reexamination of the record reveals no proof that the principals of Fla-Ga ever instigated or knew of the contacts by Simmons, Foley, or Spades (assuming arguendo that they were made), the shopbook entries become valueless.

3. We turn now to the question raised as to the qualifica-

tions of Jacksonville Broadcasting Corp. to participate in this proceeding as of January 21, 1963, it being alleged by Fla-Ga in a motion to strike notice of appearance that JBC had dissolved (except for certain limited purposes under Florida law) on December 27, 1960, and was no longer a party applicant before the Commission, although by an instrument dated October 10, 1960, JBC had assigned to Jacksonville Broadcasting Co. (a copartnership) all its assignable rights in the corporation's application. We disposed of this contention pro tem by a memorandum opinion and order of February 7, 1963 (FCC 63-118; 30678), wherein we permitted counsel for an entity styling itself "Jacksonville Broadcasting Corporation" to appear and argue exceptions as to the conduct of such corporation in the ex parte phases of this matter. We specifically declined to pass upon the corporation's continuing status, the validity of the assignment, whether the corporation or copartnership was a party applicant before the Commission, or any other aspect. In view of our decision, infra, concerning ex parte conduct by Jacksonville Broadcasting Corp., we find it unnecessary to pass upon any of these other questions. Since we have found JBC disqualified by reason of its conduct as of a date long antedating its dissolution, these remaining questions become moot.

4. A question as to the validity of the proceedings in toto was raised by Fla-Ga which contended that no action adverse to its grant could be taken by the Commission without compliance with 47 U.S.C. 312 (i.e., revocation). The examiners discussed this at length in conclusions 1-4 of the initial decision. The Commission recognizes that the status of the grant in this case approached nearer to a state of unreviewable finality (if such there be) than those in the other ex parte cases we have considered in recent years. However, since our decision, infra, is not adverse to Fla-Ga, we find it unnecessary to pass upon the questions raised by that party. We do not adopt the examiners' conclusions 1-4, not because we find them incorrect, as to which we refrain from opinion, but because we find them unnecessary.

5. Remaining to be discussed is our disagreement with the examiners' evaluation (see I.D. conclusion 9) of the

effect on City's qualifications of the misconduct of Commissioner J. Dillon Kennedy. The examiners found that Kennedy, an elected commissioner of the city of Jacksonville, had indulged in improper ex parte activities designed to further City's application. They further found (finding 12) "* * * Kennedy did not have authority to enter into the agreement with Draper, * * * and no other official of the city ratified, condoned, or knew of his negotiations and arrangements hereinabove found." However, they concluded (conclusion 9), "* * * City cannot escape the legal onus of these activities which were undertaken in its behalf. The innocence of the majority of the individuals associated with the City does not furnish cause for excusing or for the condonation of Kennedy's acts * * *," citing *WOKO* v. *FCC*.[2]

Unlike the examiners, we do not believe that the true question presented is "excusing or * * * condonation of Kennedy's acts." The question is, rather, whether his actions, which we believe were wrong, are to be imputed to the city. As shown by paragraphs 5 and 12 of the findings of fact of the initial decision, which we have adopted, Commissioner Kennedy's duties were limited to "supervision * * * [of] City's Electric and Water Departments, Municipal Docks and Terminals and its broadcast facilities" and even in connection with these prescribed duties he had no independent authority to do anything. See findings 4, 5, 12, and 13 of the 1956 Commission decision (12 R.R. 113 at 119 et seq.). No individual commissioner has the authority to act for the city, and all such action must be by a vote of the majority of the city commission.[3] Limited preliminary authority may be delegated to a particular commissioner subject to report to and ratification by the commission en banc. The minutes of the city commission reveal neither negotiation of any sort concerning Miles Draper and the city's television application, delegation to Commissioner Kennedy, nor ratification of Commissioner Ken-

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[2] *In re WOKO, Inc.*, 10 FCC 454 (1944): reversed sub nom. *WOKO* v. *FCC* (C.A.D.C., 1946), 80 U.S. App. D.C. 333, 153 F. 2d 623; reversed sub nom. *FCC* v. *WOKO*, 329 U.S. 223, 91 L. Ed. 204, 67 S. Ct. 213 (1946).

[3] R. 6305, 6306, 6590, 6597, 6613.

nedy's agreements with Draper. For these reasons, the actions of Commissioner Kennedy were distinctly ultra vires. And while it is true that even an ultra vires act of this sort is subject to ratification and consequent liability on the part of the municipal corporation,[4] in this case it is clear that there was no subsequent ratification by or even knowledge (until public disclosure) of Kennedy's actions by the Commission. It is our further view that the marked limitations of Kennedy's authority also clearly distinguish this situation from *WOKO*. In *WOKO* an officer of the corporation had the duty and authority to file reports with this Commission, and after he filed untruthful reports, we imputed such wrongful conduct to the corporation in accordance with the basic principles of corporation law. In such cases, it is said, "* * * the officer is placed in such a position by the corporation that as its agent he has the power to commit the wrong, and therefore it should bear the burden of his wrongdoing."[5] For the foregoing reasons we affirm the examiner's findings as to the actions of Kennedy, but set aside the conclusions insofar as they impute such actions to City, or conclude that City is disqualified to be a Commission licensee.

Conclusions

1. Conclusions 1-4 of the initial decision are not adopted for the reasons set forth in paragraph 4, "Discussion," supra.

2. Conclusions 5 and 6 of the initial decision are adopted and incorporated by reference as fully as if set forth at length herein, except as changed by the ruling on city's exception 26.

3. Conclusion 7 of the initial decision is set aside, and in lieu thereof we conclude that in any further proceedings to be had in connection with the subject applications, JBC is disqualified from consideration because of attempts by individuals identified with it to influence the Commission

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[4] *Salt Lake City* v. *Hollister*, 118 U.S. 256, 30 L. Ed. 176, 6 S. Ct. 1055 (1886).

[5] 13 AmJur, "Corporations," No. 1125; see also 43 A.L.R. 615.

through methods outside the recognized and public processes of adjudication. City and Fla-Ga, on the other hand, are not shown by the evidence to be disqualified from further consideration, and nothing in this record may be held to reflect adversely on their applications.

4. Conclusion 8 of the initial decision is adopted and incorporated by reference as fully as if set forth at length herein.

5. Conclusion 9 of the initial decision is specifically set aside for the reasons detailed in paragraph 5, "Discussion," supra. In lieu thereof we conclude that Kennedy's actions were ultra vires, unknown to the city commission or City, and not to be imputed thereto. City, therefore, remains qualified to be an applicant although its application has been withdrawn.

6. Conclusion 10 of the initial decision is adopted and incorporated by reference as fully as if set forth at length herein, except that in the penultimate sentence thereof the words ", as with J. Dillon Kennedy, *supra,*" are stricken, and following the penultimate sentence is added "*In re WKAT, Inc.*, 29 FCC 216, 17 R.R. 997 (1960); affirmed sub nom. *WKAT, Inc.* v. *FCC* (C.A.D.C., 1961), 111 U.S. App. D.C. 253, 296 F. 2d 375, 21 R.R. 2100."

7. Conclusion 11 of the initial decision is adopted and incorporated by reference as fully as if set forth at length herein.

8. Conclusion 12 of the initial decision is stricken and in lieu thereof, in the light of the conclusion as to the disqualification of JBC, we affirm the examiners' denial of a petition to amend its application, filed May 8, 1961.

9. Conclusions 13, 14, and 15 of the initial decision are adopted and incorporated by reference as fully as if set forth at length herein, except that the parenthetical material at the end of conclusion 13 is stricken, and conclusion 14 is amended to add following the words "* * * interested citizen * * *," the words "who was acquainted with and held the principals of Fla-Ga in personal regard."

10. Conclusions 16 and 17 of the initial decision are not adopted as inappropriate to the Commission decision.

Accordingly, *It is ordered,* This 11th day of September

1963, that the grant of a television construction permit to Florida-Georgia Television Co., Inc., as embodied in the Commission's decision released August 31, 1956 (FCC 56-800; mimeo No. 34118), *Is void and it is hereby set aside;* that Jacksonville Broadcasting Corp. *Is disqualified* from receiving a grant of its application; that the denial by the examiners of the petition of Jacksonville Broadcasting Corp., filed May 8, 1961, to amend its application, *Is affirmed;* that the motion to reopen record filed by Office of General Counsel on June 13, 1962, *Is denied;* and

It is further ordered, That the motions requesting correction of transcript filed by Jacksonville Broadcasting Corp. and City of Jacksonville *Are granted* and the transcript *Is ordered corrected accordingly;* that the petition to accept motion requesting correction of transcript filed by Florida-Georgia Television Co., Inc., *Is granted* and the Secretary *Is authorized and directed to file* the motion requesting correction of transcript lodged by Florida-Georgia Television Co., Inc.; and the said motion of Florida-Georgia *Is granted* and the transcript *Is ordered corrected accordingly;* and

Upon a complete review of the entire record, *It is further ordered,* That the Commission's decision of August 31, 1965, insofar as it granted a construction permit to Florida-Georgia Television Co., Inc., *Is nunc pro tunc readopted;* the Commission's grants of station licenses on September 20, 1957, and February 12, 1958, *Are nunc pro tunc, affirmed;* and the application of Florida-Georgia Television Co., Inc., for renewal of television station license for WFGA-TV, Jacksonville, Fla., filed November 30, 1960, insofar as it has been continued in a deferred status by reason of the questions raised in this proceeding, *Is removed* from such deferred status, without prejudice to any other causes for deferral imposed by Commission processes.

APPENDIX

Rulings on Exceptions of City of Jacksonville

Exception No.	*Ruling*
1, 16, 17, 23, 24	Denied. The existing decision adequately reflects the finding contended for.
2, 8, 9, 13, 21	Denied. Of no decisional significance.
3, 4, 5, 6, 7, 12, 14, 18, 19, 27	Denied. On conflicting evidence the trier of fact has found or concluded to the contrary and the Commission concurs.
10, 11	Granted to the extent of deleting from finding 6 the words "to ascertain if there was political activity"; denied as to the remainder as adequately reflected in the initial decision.
15	Denied, as to the first sentence for the reasons stated in ruling on exception 14; denied as to the remainder as exceptions properly run to facts—not inferences.
20	Denied, as to the first sentence for the reason given in ruling on exception 3; denied as to the remainder as of no decisional significance.
22	Denied as exceptions properly run to facts—not inferences.
25	Granted and finding 26 is amended by deleting from the third sentence the words "the three applicants" and substituting the words "Florida-Georgia and JBC."
26	Granted and conclusion 5 is amended by deleting from the second sentence the words "the three applications" and substituting the words "Florida-Georgia and JBC".
28, 29, 30	Granted in substance.

Rulings on Exceptions of Florida-Georgia Television Co., Inc.

1	Denied. Of no decisional significance.
2, 4	Denied. The decision adequately reflects the evidence.
3	Denied. The sought finding would be a superfluous reproduction of evidence.
5	Denied. Immaterial.
6, 7, 8, 17, 18	Denied. Moot in view of par. 2, "Discussion."
9, 10, 19	Granted in substance. See exception 4(a), OGC.
11	Denied. Mr. Conroy's subjective impressions are irrelevant and immaterial.
12	Denied. Congressman Herlong's speculations are irrelevant and immaterial.
13	Denied. Moot in view of the decision herein. See par. 4, "Discussion."
14, 15, 20	Denied. The Commission concurs with the examiners.
16	Denied. Exceptor has no right to a particular line of reasoning.
21, 22	Denied. Moot in view of the decision herein.

Rulings on Exceptions of Jacksonville Broadcasting Corp.

1	Denied. Exceptions must run to the examiner's findings and/or conclusions—not the explicitness with which his reasoning is set forth.
2, 3	Denied. 47 CFR 1.154(a) not complied with.
4, 7, 8, 9, 10, 11, 14, 15, 16, 23.	Denied. Moot in view of the Commission's decision, see par. 2, "Discussion."

Exception No.	*Ruling*
5, 12, 17, 21, 24, 25, 34	Denied. On conflicting evidence the trier of fact has found or concluded to the contrary and the Commission concurs. Further, the exceptions in some respects lack specificity (47 CFR 1.154(a)), transcript references are argumentative, and postulate as facts, items not proven.
6	Denied. 47 CFR 1.154(a) not complied with (lack of specificity, lack of transcript references, argumentative)
18, 30	Denied. The finding complained of adequately reflects the evidence.
19	Denied. The trier of fact saw and heard the witness. Exceptor's reasons are nonspecific and a non sequitur.
20	Denied. Simmons *did* so deny. The trier of fact believed the witness and, on conflicting testimony, the Commission concurs.
22	Denied, as to the first portion for the reasons stated under exception 4; denied, as to the second portion because neither Senator Holland nor Ralph Davis is competent to draw the conclusion of law re the shopbook rule, and further, neither testified to the facts claimed.
26, 27, 28, 29	Denied as cumulative of exceptions hereinbefore ruled on and as lacking in specificity.
31	Denied. The excepted-to "finding" is an evaluation.
32	Denied. If the conclusion be satisfactory to exceptor, he has no right to a specific line of reasoning.
33	Denied. Argumentative. 47 CFR 1.154(a) not complied with.
35	Denied as argumentative, cumulative, lacking transcript references, and bottomed on an erroneous view of the law; i.e., that ex parte contacts are proper if other parties are also making them.
13	[There is no exception so numbered.]
	Rulings on Exceptions of Office of General Counsel
1(a), 1(e), 1(i)	Denied, for lack of specificity.
1(b)	Denied. The evidence referred to remains in the record and has been considered and evaluated by the Commission—it was not stricken.
1(c) (1), 1(c) (2), 1(c) (3).	Denied. The evidentiary material was not excluded.
1(d)	Denied. The examiner's evaluation was an ad hoc determination that certain evidence did not warrant findings; not a ruling that such type of evidence cannot so warrant.
1(f), 1(g), 1(h), 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 3(a), 4(b), 4(c).	Denied as moot in view of the Commission decision, see par. 2, "Discussion."
3(b), 5(a), 5(b), 5(c), 7(a), 7(b), 8(a).	Denied. On conflicting evidence the trier of fact has found or concluded to the contrary and the Commission concurs.
3(c)	Denied as to all but the last subsection as moot, see ruling on exception 1(f) et al, supra; denied as to the last subsection as of no decisional significance.

Exception No.	*Ruling*
4(a)	Granted to the extent that the words "introductions of its corporate officials to" in finding 19(c) are stricken and the words "making some contacts with" are substituted.
5(d)	Granted. See conclusion 9 herein.
5(e)	Denied as to the first 2 subsections as lacking decisional significance in view of Chase's testimony; denied as to the third and fourth subsections as lacking decisional significance; denied as to the last subsection as contrary to the examiner's finding on conflicting evidence, with which finding we concur.
6(a)	Denied on the ground that "business" was never clearly defined in the record.
6(b)	Denied. The cited material might have supported a different evaluation of Simmons' credibility by the examiner—it does not compel it.
6(c)	Denied. The overwhelming bulk of testimony must be based on "recollection," absent written records, *alibi*, impossibility, etc., and it is a valid basis for such testimony.
6(d)	Denied. There is no evidence in the record contradicting the fact that Simmons conducted an insurance survey and was paid for it. Impeaching evidence and/or examination may only affect the weight of the evidence in chief. It cannot affirmatively establish anything, whether successful or not.
6(e)	Denied. The fact of Simmons' having made the phone call not being established, the remainder of the sought findings are immaterial.
8(a)	Denied. The cited factors might permit the inference sought by exceptor but do not compel it. The Commission concurs with the examiners.
8(b)	Denied. The several conflicting versions of the Holtz-Jones interview, coupled with Jones' explanations during testimony, permit several inferences and do not compel that sought by the exceptor. For the reasons set out in conclusion 9, supra, the Commission declined to conclude ultimately adversely to Florida-Georgia.
9	Denied, for reasons set forth in par. 2, "Discussion."
10, 11	Denied. In view of the ultimate conclusion to the end sought by exceptor, he has no right to a specific line of reasoning.

APPENDIX C

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Docket No. 10833 File No. BPCT-749

In re Applications of

CITY OF JACKSONVILLE, JACKSONVILLE, FLA.

Docket No. 10834 File No. BPCT-1624

FLORIDA-GEORGIA TELEVISION CO., INC., JACKSONVILLE, FLA.

Docket No. 10835 File No. BPCT-1625

JACKSONVILLE BROADCASTING CORP., JACKSONVILLE, FLA.

For Construction Permits for New Television Stations
(Channel 12)

INITIAL DECISION OF HEARING EXAMINERS JAMES D. CUNNINGHAM AND CHESTER F. NAUMOWICZ, JR.

(Adopted April 9, 1962)

PRELIMINARY STATEMENT

1. This is a proceeding on remand involving the above-entitled applications which was instituted by the Commission for the reasons hereinafter shown. Briefly summarized, the original actions taken with regard to these applications are as follows: On April 4, 1955, Hearing Examiner Charles J. Frederick released an initial decision looking toward a grant of the application of Jacksonville Broadcasting Corp. (JBC) for construction permit to establish a new television broadcast station (channel 12) at Jacksonville, Fla., and a denial of the competing applications of City of Jacksonville (City) and Florida-Georgia Television Co., Inc. (Florida-Georgia), for the same facilities; on August 31, 1956, following oral argument on exceptions to the initial decision, the Commission released its final decision granting the Florida-Georgia application and denying those of JBC and City; a license, pursuant to construction

permit, was issued Florida-Georgia on September 20, 1957, and renewed on February 12, 1958; a modified license was issued on May 22, 1959, expiring February 1, 1961. Action on the application of Florida-Georgia for renewal of the modified license has been deferred. It is now operating the facility under the call letters WFGA-TV.

2. In an order released August 2, 1960, the Commission, upon consideration of testimony adduced before the Subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce, House of Representatives, as related to the question of possible ex parte representations made during the course of the above-entitled proceeding, reopened the case and remanded it for further hearing on the following issues:

1. To determine whether any of the members of the Commission who participated should have disqualified himself from voting in the proceedings before the Commission which resulted in the award of a construction permit for a television station on channel 12 in Jacksonville.

2. To determine whether any person or persons influenced or attempted to influence any member of the Commission with respect to the proceedings resulting in the award of the construction permit for channel 12, Jacksonville, in any manner whatsoever except by the recognized and public processes of adjudication.

3. To determine whether any party to the proceedings before the Commission which resulted in the award of the construction permit for channel 12 in Jacksonville directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings.

4. To determine, in the light of the facts adduced upon the foregoing issues, whether the grant heretofore made of a construction permit for channel 12, Jacksonville, was void ab initio, and if not, whether such grant is voidable and action should be taken to set it aside; whether any of the applicants in this proceeding was and is disqualified to receive a grant of its application; and whether the conduct of any appli-

cant, if not of a disqualifying character, has been such as to reflect adversely upon such applicant from a comparative standpoint.

The hearing order permitted all parties to the original proceeding to participate in the remand proceeding, afforded an opportunity to any persons concerning whom evidence might be received to cross-examine and to submit rebuttal testimony, and authorized participation by the Attorney General of the United States as amicus curiae. The hearing so ordered was concluded on December 21, 1961.[1]

3. While the instant proceeding is cast in an adjudicatory format wherein substantial rights of the parties are to be determined, to some extent it partakes of an investigatory proceeding requiring Commission counsel to explore the issues largely through the evidence of witnesses who are at least technically hostile in that the issues contemplate the possibility of conclusions adverse to their own or their associates' interests. Accordingly, an extremely liberal policy was adopted by the presiding hearing examiner as to the admission of evidence, and, over objection, a number of exhibits and a considerable volume of testimony were received, although the customary foundation establishing their competence and relevancy had not been laid. This was deemed an appropriate exercise of the hearing examiner's discretion to govern the order of proof, in view of the peculiar problems confronting Commission counsel charged with presenting the case. However, a departure from the customary order of proof did not obviate the necessity for the establishment at some point in the hearing of that qualifying foundation which would ordinarily have been required prior to the adduction of specific items of substantive evidence, for "if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed." *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580. Therefore, to the

[1] In the interest of expediting final disposition of the proceeding, all parties thereto agreed that, in the preparation of this initial decision, Hearing Examiner Chester F. Naumowicz, Jr., would assist Hearing Examiner James D. Cunningham who presided in the said proceeding.

extent that the subsequent course of the hearing supplied the lacking foundation for such evidence, it has been considered in reaching the findings of fact which follow. Of necessity, the substantial volume of testimony not subsequently connected up as competent and relevant has been ignored.[2] This procedure rendered infeasible the conventional technique of entertaining and ruling on motions to strike unqualified testimony subsequent to the closing of the parties' cases, for the scope of such motions would, of necessity, have been directed to the entire record, requiring the examiner to have permitted extended delays for the preparation of and reply to the motions, as well as the delay inherent in the detailed study by the examiner of the complete record prior to its closing. Such delays could not be countenanced in a proceeding of this type, and it is believed that the procedure which has been followed is the most likely to insure the public interest in the expeditious disposition of this case while, at the same time, guaranteeing to the parties the substantive protections to which due process of law entitles them.

Findings of Fact

4. On February 6, 1956, the Commission heard oral argument on the parties' exceptions to the initial decision in this proceeding, and, subsequently, issued instructions to its

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[2] This is not to suggest that the technical rules of evidence have been applied strictly. The common law rules of evidence are relaxed in administrative hearings, and evidence which might be inadmissible in the more formal context of a judicial proceeding may be admitted in an administrative hearing if it is inherently credible. However, the abjuration of the common law rules of evidence is not tantamount to an abandonment of the philosophy and experience which underlie those rules, and administrative officers cannot base their decisions on testimony which is essentially speculative or directed to matters outside the ken of the witness in the absence of surrounding circumstances lending support and credibility thereto. That is, technically inadmissible evidence may be admitted only in a factual situation which lends it an aurora of probability. To the extent that any parties' proposed findings of fact have been rejected because they rely for material findings on evidence which the hearing examiners deem unavailable for consideration, a brief explanation for the reasons therefor is included in the text of the initial decision.

Office of Opinions and Review[3] to prepare a decision granting the application of JBC and denying the applications of Florida-Georgia and City. On June 27, 1956, the Commission considered a draft decision prepared in accordance with its instructions and deferred action thereon. It was again considered on July 5, 1956, at which time the Commission issued further instructions for the preparation of a revised decision granting the Florida-Georgia application and denying the applications of JBC and City.[4] The revised draft decision was considered by the Commission on July 18, 1956, but action was not taken. On August 29, 1956, the Commission adopted the revised draft decision granting the Florida-Georgia application,[5] together with an order denying a petition for rulemaking and request for stay of final decision which had been filed by JBC. On August 1, 1957, the Commission adopted an order denying a petition by JBC for reconsideration and other relief.[6]

City of Jacksonville

5. J. Dillon Kennedy has served as commissioner of the city of Jacksonville for the past 13 years. He is designated utilities commissioner[7] and under his immediate super-

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[3] At that time, the Office of Opinions and Review was constituted pursuant to the provisions of then 47 U.S.C. 5(c), and functioned, insofar as here pertinent, "to assist the Commission in cases of adjudication—by preparing for the Commission or any member or members thereof, without recommendations and in accordance with specific directions—memoranda, opinions, decisions, and orders." Thus, the Office served as the scrivener of the Commission's intent, translating the Commission's ultimate decision and its basic reasons therefor into the form of a finished decision.

[4] Commissioners McConnaughey (Chairman), Hyde, Doerfer, Lee, and Mack voted for the revised instructions. Commissioner Bartley favored adoption of the draft decision granting JBC, and Commissioner Craven abstained.

[5] Commissioners Hyde, Doerfer, Lee, and Mack voted for adoption of the decision. Commissioners McConnaughey (Chairman), and Bartley dissented in favor of JBC, and Commissioner Craven abstained.

[6] Commissioners Doerfer (Chairman), Hyde, and Mack voted for adoption of the order. Commissioners Bartley and Lee dissented and Commissioner Craven abstained.

[7] It is the practice of the city commission of Jacksonville to designate certain of its five members to supervise various aspects of the administration of the city's affairs. Commissioners so designated do not require

vision are the city's electric and water departments, municipal docks and terminals, and its broadcast facilities. During February of 1955, Kennedy met with Miles H. Draper, a Tampa, Fla., attorney and longtime friend. In the course of their conversation on this occasion, Kennedy spoke of rumors that politics entered into the granting of television licenses, and, specifically, that JBC was attempting to bring political pressures to bear upon the Commission in favor of its application in this proceeding.[8] Kennedy, who was aware of Draper's extensive political acquaintance, asked him to investigate and to "neutralize" these pressures. In effect, his instructions to Draper were that if, as a result of this investigation, Draper's judgment was that political pressures were being brought to bear upon the Commission in the matter, he should attempt to utilize the same type of pressures in behalf of the city to induce the Commission to act favorably upon its application. Thus, Draper was given plenary authority and unlimited discretion to engage in these political activities by the city commissioner who was primarily and directly concerned with, and responsible for, the prosecution of the city's application. It was understood between the two men that Draper, in accomplishing the objective, might associate with one of his Washington contacts, and a fee of $5,000 was agreed upon for the service. However, the agreement at this time was tentative and action by Draper was to await the release of the initial decision of the hearing examiner who had presided in the comparative proceeding. At the time of these negotiations, the city was represented of record by a firm of Washington attorneys.

6. Following his talk with Kennedy, but prior to the release of the initial decision on April 4, 1955, Draper com-

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individual executive or administrative control over their departments, but they undertake to familiarize themselves with the day-to-day operations of their departments and to submit recommendations to the city commission as a whole and such recommendations are subject to the majority vote of the commission. No commissioner can, on his own initiative, bind the city or exercise the authority of the commission.

[8] Such rumors are considered only to the extent that they furnish background for and tend to explain the actions of the individuals mentioned herein and not as establishing their truth.

municated with Harlan L. Kays, a Washington attorney, and related to him the substance of the conversation and tentative agreement with Kennedy. Draper was aware that Kays had formerly served on the staff of a Member of Congress and of his wide acquaintance in political circles in Washington. The tasks outlined for Kays were to attempt to familiarize himself with the proceeding; to ascertain if there was political activity; and to keep Draper advised of all procedural and administrative aspects of the matter. Kays agreed to accept the employment, subject to Kennedy's final commitment after issuance of the initial decision, and he agreed further that the $5,000 fee would be divided evenly after expenses were deducted.

7. Prior to the release of the initial decision, supra, and between the date of its release and September 9, 1955, Draper wrote Kennedy on several occasions asking for his final word as to the employment and advising that his contact in Washington "is ready to take action when properly advised." On September 13, 1955, Kennedy and Draper met in Tampa, Fla., and a verbal operative agreement was consummated pursuant to the terms of their discussion in February 1955, supra. Draper notified Kays of this promptly and accompanied him to the Commission's offices in Washington for the purpose of ascertaining the steps necessary to gain his admission to practice before the Commission and of introducing him to Commissioner Richard A. Mack.[9] Failing to locate Mack, the two men, without invitation or appointment, proceeded to the office of Commissioner Rosel H. Hyde. Kays, who had met the Commissioner once previously, introduced Draper. They advised him of their interest in the Jacksonville case, but made no attempt to discuss its merits. However, they did ask if they might keep informed of the procedural aspects of the matter through his office. The Commissioner referred their routine request to members of his staff.

8. About 1 week later, Kays returned to Commissioner Mack's office and introduced himself to the Commissioner

[9] Prior thereto, Kays' only activity had been to inquire at the office of the Commission's Secretary as to when the release of the initial decision was expected.

on the strength of his earlier call in the company of Mack's friend, Miles H. Draper. He advised Mack that he was interested in the Jacksonville television contest, although he did not identify the applicant he was representing [10] and there was no discussion of the merits. Mack's staff directed him to the appropriate Commission personnel in connection with his desire to be admitted to practice.

9. Prior to the release of the Commission's final decision, Kays called at the offices of the Commission on 8 or 10 occasions and spoke to Commissioners Mack or Hyde or members of their staffs. His conversations were limited to matters of procedure, viz, questions such as whether the Commission's decision had been released, etc., and he secured no information which was not available to anyone who might inquire at the office of the Commission's Secretary. There is no evidence that he discussed the merits of the case with either of these Commissioners or with any other member of the Commission or its staff and it is so found.

10. Draper's only additional contact at the Commission was on the day of oral argument on exceptions to the initial decision. At that time he encountered Mack in the hall and engaged in a perfunctory conversation unrelated to the merits of the proceeding. However, he did make one call at the White House where he spoke to a person he was unable to identify, and two calls at the Republican National Committee, during one of which he spoke to the chairman. At both locations he was told that no attempt was being made to exercise political pressures in television cases in general or in the Jacksonville case in particular.

11. Following the Kennedy-Draper agreement of September 1955, Draper made numerous telephone calls and addressed communications to Kennedy with respect to his $5,000 fee for what he called "legal services." Kennedy ignored these claims until early in March of 1956, when he discussed them with his friend George B. Hills, a Florida businessman. Kennedy denied to Hills that he had retained Draper or agreed to pay him, but, after investigating the situation, Hills advised Kennedy to satisfy Draper's claim,

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[10] Subsequently, Kays mentioned to a member of Commissioner Mack's staff that he and Draper were representing the city of Jacksonville.

and, in view of his friendship with Kennedy, committed his firm to furnish the money. Hills then gave Kennedy $2,500 in cash, and on March 24, 1956, Kennedy paid this to Draper. Shortly thereafter, Draper pressed for the balance, and on September 24, 1956, wrote Hills' firm (Reynolds, Smith & Hills), stating that Kennedy had refused to respond to his billings and requesting the firm to pay the account. On October 1, 1956, Reynolds, Smith & Hills issued a check in the sum of $2,500 to Draper. After deduction of certain expenses, Draper split the total amount with Kays, who received two payments of approximately $1,200 each. The calls at the White House and the Republican National Committee, in Draper's view, justified his fee, for he believed he was being paid because his acquaintanceship among influential political figures in Washington was such that he could obtain information from sources unavailable to the ordinary individual.

12. As a city commissioner of Jacksonville, Kennedy did not have authority to enter into the agreement with Draper, [11] and no other official of the city ratified, condoned, or knew of his negotiations and arrangements hereinabove found.

13. The city is no longer desirous of prosecuting its application; it does not wish to be considered a current applicant; and its participation in the remand proceeding is in order to cooperate with the Commission's inquiry into the matter of the original grant herein.

Florida-Georgia Television Co., Inc.

14. At the time the applications were pending before the Commission, George H. Hodges was president, director, and a substantial stockholder in Florida-Georgia. He was the corporate official most intimately concerned with the prosecution of the Florida-Georgia application. It is here found from the evidence that he never personally contacted any member of the Commission in connection with the case; that he did not seek to have anyone intercede therein; and

[11] There was no direct arrangement between Kennedy and Kays, although Kennedy was aware that Draper had associated himself with a Washington attorney in the matter.

that he was unaware of any improper contacts being made. The same findings are appropriate with regard to the remaining officials of this applicant.

15. Hodges numbered Randall Chase, a Florida businessman, among his personal friends. They had served together on several corporate boards. Chase was also acquainted with business associates of Hodges who assisted in the ultimate construction of station WFGA-TV, and, on occasion, he engaged in casual conversations with these individuals relative to the application of Florida-Georgia Television Co., Inc. On July 14, 1955, Chase sent a letter to Commissioner Mack, with whom he had a slight and casual acquaintance from dealings with the Florida Railroad and Public Utilities Commission of which Mack had formerly been a member, advocating favorable consideration of the Florida-Georgia application. The evidence of record indicates nothing more than that the letter in question was forwarded to the Commissioner by virtue of Chase's interest as a resident of the station's proposed service area, and it cannot here be found that it was prepared at the behest of Hodges or any of his associates in the Florida-Georgia application. Neither Hodges, nor any of the Florida-Georgia principals, had knowledge of this letter until a date subsequent to the final disposition of the Jacksonville applications.[12]

16. Lester W. Foley, a Jacksonville businessman, is president of Beiswenger, Hoch & Associates, Inc., an engineering firm which did preliminary survey work on the Florida-Georgia television tower, for which it was paid the sum of $2,070.42.[13] He is a personal friend of Hodges and

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[12] A contrary finding based on the fact that subsequent contacts between Chase and principals of Florida-Georgia afforded an opportunity for discussion of the letter would be unwarranted, absent some evidence that such opportunities were, in fact, so utilized, for such a finding would rest on mere conjecture.

[13] The record is ambiguous as to the itemization of this billing. The Office of General Counsel urges a finding that an item of $355.67 listed as "travel" represented reimbursement for the expenses incurred by Foley and Cyril C. Spades (infra) on a trip to Washington to visit Commissioner Mack. However, although the record fails to establish this sum as a legitimate expense, the total lack of evidence as to what the sum was expended for would render such a finding completely conjectural.

a casual friend of Commissioner Mack whom he saw in Washington during the spring of 1956 in connection with a matter unrelated to the Jacksonville television proceeding.[14] As an incident of this conversation, Foley inquired how things were going in the Jacksonville case. Mack informed him that the matter was proceeding routinely. He saw Commissioner Mack again a short time later and introduced Cyril C. Spades, a Florida politician and one of Foley's business associates. There is no acceptable evidence of a discussion of the Jacksonville proceeding on this occasion and it is so found. Foley telephoned Mack about a month after the second meeting in an attempt to arrange a social appointment, which never developed. The record contains no evidence of any improper discussion between Foley or Spades and any member of the Commission;[15] no evidence to indicate that any official of Florida-Georgia requested Foley or Spades to make an ex parte approach to a member of the Commission; and no evidence that Foley or Spades advised any official of Florida-Georgia Television Co. of their unrelated conversations with Commissioner Mack. It is here found accordingly.

17. Cyril C. Spades, at the time the applications herein were pending before the Commission, was Republican national committeeman of Florida. He was periodically employed by Beiswenger, Hoch & Associates, Inc., on a per diem basis to assist in the procurement of Government contracts. On the day Commissioner Robert E. Lee's original appointment to the Commission was confirmed, and before commencement of the original hearings in the

[14] Foley's business activities necessitated frequent trips to Washington, D.C.

[15] The so-called "Mack Diary," a record of office activities kept by Commissioner Mack's office staff, states that Foley's visits with Mack in the spring of 1956 were in connection with the Jacksonville TV proceeding. However, the evidence shows that the "diary" was not necessarily composed, with respect to specific items, at Commissioner Mack's direction, and the person making any individual entry would not necessarily know the purpose of the call but might merely guess thereat. Under such circumstances, the "diary" must be regarded as without evidentiary weight in establishing the purpose of Mr. Foley's calls. It is to be observed, in this connection, that mere diary entries standing alone would not furnish a proper evidentiary foundation for findings of improper ex parte contacts.

proceeding, Spades called on him to offer congratulations. In the course of their conversation, a reference was made to the Jacksonville proceeding, and, although Commissioner Lee explained that he had no opinion in the matter and that the hearing had not been held, he was unaware of any substantial number of municipalities which had received television licenses. In light of the immediate chronological proximity of this conversation to Commissioner Lee's appointment to the Commission and his obvious unawareness of the facts of the case at the time, this remark must be construed as a general observation rather than a hint as to his own or the Commission's views with respect to the application of the city of Jacksonville. At the time of this conversation, Spades favored a grant to the city, although he did not mention this fact to Commissioner Lee, and his preference was a personal one which did not stem from an attempt on the part of any city official to secure his assistance.

18. Some time later, Spades again called on Commissioner Lee. Although not contacted by any of the applicants in the case or their representatives, his sympathies had swung over to the Florida-Georgia application. He regarded City's proposal as having no real chance of success, and, because one of the principals in JBC was actively engaged in political enterprises on behalf of the Democratic Party, he preferred Florida-Georgia through a process of elimination. When Spades "practically indicated" to Commissioner Lee that he favored the Florida-Georgia application, the Commissioner refused to discuss the matter and summarily dismissed him from his office. There is no evidence indicating that Florida-Georgia, or any of its officials, solicited, knew of, or condoned Spades' attempt to discuss the case with Commissioner Lee, or, in fact, that any significant relationship existed between Spades and Florida-Georgia or its principals, and it is so found.

19. Evidence from or concerning a number of other individuals connected, or purportedly connected, with the Florida-Georgia application was adduced. While each particular piece of this evidence suffers from a lack of

relevance, materiality, or competence, the major portions thereof are briefly summarized in the interest of a more complete initial decision.

(*a*) Harold S. Cohn is a director and stockholder of Florida-Georgia. Alfred W. Jones is a former stockholder of the corporation. There is no evidence that either of them contacted any member of the Commission or had any knowledge of any contacts being made by anyone else and it is so found.

(*b*) Guy L. Simmons, a personal friend of Hodges, with whom Hodges discussed the television application, is a Jacksonville real estate and insurance broker who wrote a small insurance policy for this applicant, [16] and who also conducted, and was paid $500 for, an insurance survey for the corporation. From 1937 to late June of 1955, he was a city commissioner of Jacksonville. A record in the office of Senator Spessard Holland of Florida indicates that on June 10, 1955, a call was received from "Guy Simmons, city manager of Jacksonville," [17] stating that the city's application was no longer in the contest, and expressing the hope that the Senator would lend his support to the Florida-Georgia application.[18] The Senator's office record also

[16] The coverage involved a fidelity bond and was written on Dec. 19, 1957. On Feb. 24, 1958, the policy was canceled and a new policy underwriting increased coverage was issued in lieu thereof with a slight increase in premium. Simmons' failure to recall this substitution of policies does not impair his credibility as a witness, it not being shown to be a matter of significance or any motive being assigned as to why he would deliberately conceal this information after freely admitting that he wrote the original policy.

[17] Simmons never occupied the position of city manager of Jacksonville.

[18] The record in the Senator's files cannot be used independently as the basis of any finding beyond the fact that such a call was received in the Senator's office. Thus, it may not independently form the basis of a finding that Simmons made the call. Although the foundation testimony established the record as a regular and routine entry in the Senator's file, thereby possibly qualifying it for admission under the philosophy of the "shopbook rule," the failure of the foundation testimony to establish that the person who received the call or who prepared the record was able to identify Simmons' voice, or otherwise authenticate the identity of the caller, renders the record hearsay and incompetent to prove the fact of who made the call.

indicates that he declined to interfere in the matter. Simmons denies having made the call or having called the Senator's office at any time.

(*c*) Msgr. Maurice S. Sheehy, who served as a chaplain at Jacksonville Naval Air Station during World War II, is a personal friend of Hodges of Florida-Georgia, Stockton of JBC, and Foley of Beiswenger, Hoch & Associates. Prior to the adjudicatory phase of this proceeding, Florida-Georgia encountered difficulty in obtaining airspace clearance for its tower because of objections of the U.S. Navy. At Foley's request, Monsignor Sheehy assisted the applicant by arranging introductions of its corporate officials to Navy personnel with whom he was acquainted, his purpose being to insure, if possible, that the Florida-Georgia tower proposal would receive a fair audience.[19] The Navy's objections to the installation were ultimately withdrawn, and the tower received airspace clearance. In July of 1956, Monsignor Sheehy held the view that the city application had no real chance of success, and communicated to Hodges and Stockton a suggestion that they reconcile their contest through a merger whereby each of their groups would acquire a 50-percent interest in the television facility involved. This record contains no evidence warranting a finding of any improper activity on Monsignor Sheehy's part, his role having been undertaken in good faith and confined to the courtesy of introducing individuals whose employment was about to bring them into contact, and of endeavoring to act as peacemaker between two of his friends whose business interests conflicted. This activity not having been found improper, it follows that no adverse findings with respect to any applicant can be predicated thereon.[20]

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[19] Monsignor Sheehy did not regard his courtesy to Florida-Georgia as indicating partisanship, and "would have been glad to have given the same assistance with the Navy to Mr. Stockton if he had asked."

[20] The evidence as to Monsignor Sheehy would not support a finding, as requested by certain of the parties, that while the case was pending before the Commission, Messrs. Spades and Foley were circulating in Washington

Jacksonville Broadcasting Corp.

20. At the time the subject applications were being prosecuted before the Commission, James R. Stockton was president, director, and a 60-percent stockholder of JBC.[21] Some time after the corporation's application was filed in June of 1952, he called on Senators Holland and Smathers and Representative Bennett of Florida and requested them not to take sides in the comparative hearing. On March 1, 1956, shortly after oral argument on exceptions to the initial decision of the presiding hearing ex-

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a newspaper advertisement calculated to excite political prejudice against Stockton of JBC. While Mr. Stockton testified that Monsignor Sheehy told him that Spades and Foley were displaying this advertisement, Stockton's testimony was, of course, hearsay, and it was unsupported by any circumstantial evidence or testimony which might tend to lend it credibility. Monsignor Sheehy mentions in the record a vague recollection of having seen the advertisement, but does not place it in the possession of Spades and Foley; and he deleted a reference to Spades and Foley in connection with the advertisement which was contained in a proposed affidavit submitted to him by the Commission counsel charged with the prosecution of this case. Both Spades and Foley deny any association with the subject advertisement. Thus, Stockton's statement is denied by the actors it concerned and impliedly rejected by the witness whom Stockton alleged had knowledge of and told him of their acts. Such hearsay testimony does not meet the test of inherent credibility referred to in par. 3, supra, and cannot form the basis of a finding of fact.

[21] During the original hearings in this case, the stock of JBC was held as follows: Stockton, 60 percent; Robert R. Feagin, 20 percent; and Stockton, Whatley, Davin & Co., a corporation, 20 percent. On Oct. 31, 1957, Stockton, Whatley, Davin & Co. surrendered its stock and thereafter Stockton owned 75 percent of JBC and Feagin 25 percent. On Oct. 10, 1960, subsequent to the commencement of the reopened proceedings herein, Stockton and Feagin formed a partnership, 75 and 25 percent, respectively, and acquired from JBC the rights to its channel 12 application. On Dec. 27, 1960, JBC was dissolved. On Mar. 23, 1961, the partnership entered into an agreement with Stockton, Whatley, Davin & Co., which provided for participation in the reopened proceeding, and ownership interests in the event the ultimate result of this proceeding should be a grant to them, in the same relative percentage as their original stock ownership in JBC. A petition to amend the JBC application to reflect these changes will be disposed of infra.

aminer, he again called on Senator Smathers and requested him to urge the Commission to expedite its final decision.[22]

21. During the latter part of June 1956, while vacationing in Canada, Stockton was advised of the Commission's action of June 27, 1956, deferring action on the draft decision which would have granted the JBC application.[23] As a result, he journeyed to Washington, where he arrived July 1, 1956. He then proceeded to do everything possible to ascertain "what was happening at the Commission," and he retained the services of a number of persons to prevail upon the Commission to adhere to its previous determination and instructions to award the grant to JBC. Stockton desired that the Commission be convinced, by means of the intervention of persons high in political circles, that it should not permit off-the-record representations or political influence to affect this decision. However, he displayed no reluctance to attempt to dispatch emissaries to communicate his wishes to the Commission ex parte, and, in his own words, he "attempted to bring influence to bear upon the Commission [through the help of anyone I thought might help] by means other than through the recognized and public process of adjudication."

22. Earlier, in January of 1956, Stockton had availed himself of the services of J. J. Daniel, a former associate of Commissioner Mack at the Florida Railroad and Public Utilities Commission, to visit Mack in Washington and request him to expedite the final decision in the case. In July of 1956, Stockton again turned to Daniel as an emissary to Mack to advise the Commissioner of the prevalence of rumors that politics were to be involved in the Jacksonville decision. Daniel traveled to Washington and visited with Commissioner Mack, who advised him that he had already made up his mind to vote for Florida-Georgia. In light of this remark, Daniel did not discuss the case further. He accepted from Stockton the sum of $200 for his services.

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[22] Senator Smathers refused to accede to the request because he believed that such action on his part would indicate a preference for JBC in view of a rumor current at that time that the Commission had already instructed its staff to prepare a decision granting the JBC application.

[23] See par. 4 of findings.

23. On July 11, 1956, Stockton telephoned Kenneth C. Royall, a New York attorney, and subsequently Stockton and his associates met with Royall on two or three occasions. He was told of Stockton's concern that political considerations might influence the decision. Royall refused to make off-the-record approaches to members of the Commission. However, he did call on the chairman of the Republican National Committee to request that organization to refrain from asserting political influence in the case. He was told that the committee had not interfered in the matter and would not do so in the future.[24] Royall was paid $2,674.60 for his services.

24. In the latter part of July 1956, Stockton called on Bailey Walsh, a Washington attorney, with whom he discussed the political apprehensions aforementioned. As a result of their conversation, Walsh introduced Stockton to the late B. Carroll Reece, former chairman of the Republican National Committee, in order that Stockton might explain his reasons for believing that politics played a part in the Commission's decision upon these applications. Walsh also undertook certain investigations of the Florida-Georgia personnel. He was paid $3,600 for his services.

25. In furtherance of his plan aforementioned, Stockton also secured the aid of three other Washington lawyers, but it would appear from the record at least that they performed only routine legal or investigative functions for which they were paid a total of $8,233.97.

Additional matters

26. As heretofore found, oral argument in the proceeding was heard by the Commission en banc on February 6, 1956. Commissioner Richard A. Mack participated in the session. On the same date, and while the matter was sub judice before the Commission on the basis of the public

[24] It is to be emphasized that, although a number of contacts were made with prominent political figures in connection with this case, ostensibly to secure assurances of their neutrality, there is no evidence indicating that the individuals or organizations mentioned attempted to influence the outcome of the proceeding, or, except as specifically noted in these findings of fact, even established contact with any member of the Commission.

record and exceptions which had been filed to the initial decision of the presiding hearing examiner, Commissioner Mack made a long-distance telephone call to Francis P. Conroy, a Jacksonville lawyer and his personal friend, for the specific purpose of discussing the relative merits of the three applicants. Specifically, Mack inquired of Conroy whether he knew "the people" identified with these applications, and whether he was aware of anything the Commission ought to know "that would indicate * * * that the one side or the other was more qualified or more acceptable or more financially responsible." These, of course, were among the primary phases of the case which Mack and his associate Commissioners at the time were required by law to consider solely upon the evidence which had been presented into the public record. Conroy advised Mack that he knew "Jim Stockton and Bob Feagin" [of Jacksonville Broadcasting Corp.]; that the "other group I associated in my mind with Hodges and Brest [of Florida-Georgia Television Co., Inc.] and the Duval Engineering people"; and that "by reputation, they were all well organized financially." During the conversation, Conroy stated that "the sum and substance of the conversation was that I knew nothing about either one of them that would indicate one or the other was more desirable." Toward the end of this conversation, Conroy inquired whether the city of Jacksonville was "still in the picture," but the record does not reveal a response by Mack. He then informed Conroy that the Commission was "looking into" the matter, and requested him to "check around town" for "anything that you think the Commission ought to know that might reveal something about the qualifications of these people." Mack then told Conroy that he would call him again on the subject. This was done late in March of 1956, and Mack invited Conroy's attention to their previous conversation, and inquired as to whether he knew "anything now that might be helpful to the Commission?" Conroy advised him that he did not, as he had made no effort "to find out anything." These two long-distance telephone calls from Mack to Conroy were unsolicited, and Conroy was not connected in any way with any of the parties to the proceeding.

27. Charles H. Murchison, a member of the law firm

which represented Stockton for many years as well as his personal friend and business associate, had discussed the case with Stockton during its various stages and was aware of his concern with regard to political influences.[25] During the time the case was pending with the Commission for final decision, Murchison visited A. Sidney Herlong, Jr., Congressman for the Fifth District of Florida.[26] In the course of their discussion, he mentioned Stockton's concern as to politics in the Jacksonville case and the rumors on which it was founded. Congressman Herlong immediately telephoned Mack to ascertain the reason why the final decision was being delayed and to vouch for the principal stockholders of JBC, but Mack notified him that, prior to coming to Washington, he had promised "Mitch Wolfson," whom he described as a principal stockholder in Florida-Georgia and a longtime friend and former schoolmate, that he was going to help him secure the television facility in Jacksonville.[27] The conversation was then terminated.[28]

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[25] Although one of Murchison's law partners represented JBC in connection with the original hearing on these applications, Murchison himself did not then represent the corporation in this matter and did not discuss it with his partner. However, he did appear as counsel for JBC in the remand proceedings.

[26] While Murchison was a member of the law firm representing JBC (see footnote 25, supra), only by the exercise of conjecture and surmise could it be found upon this record that his visit to Congressman Herlong on this occasion was at the behest of the corporate officials of JBC.

[27] At the time Mack made this statement, Mitchell Wolfson, a Miami Beach businessman, owned 5 percent of the Florida-Georgia stock. He was never a schoolmate of Mr. Mack, and, although he had encountered Mack in connection with that gentleman's service on the Florida Railroad and Public Utilities Commission, his relationship to him was casual to the point of being tenuous. He never contacted any member of the Commission in connection with this case, had no knowledge of any contacts made by anyone else, nor had any understanding with or promise from Mack with regard to the television channel involved in the proceeding.

[28] Commissioner Mack's statement to Congressman Herlong forms the basis of a finding only that he made the statement, and not as to its accuracy. With respect to Wolfson and Florida-Georgia, the statement is hearsay and incompetent to form the basis of a finding of fact. *Tri-State Broadcasting Co., Inc.* v. *FCC*, 96 F. 2d 564. Moreover, it is noted that the evidence on this record fails to establish any substantial connection between Mack and Wolfson, and, in fact, tends to discredit Mack's allegation as to their relationship (footnote 27, supra).

Conclusions

1. Preliminary to any determinations based on the foregoing findings of fact is a resolution of the question raised by Florida-Georgia Television Co., Inc., as to the Commission's jurisdiction to take action with respect to its permit or license in this proceeding, viz., under the governing law, should the proceeding be regarded as merely investigatory, or may the Commission now take effective action on the basis of this record? By its memorandum opinion and order released herein December 14, 1960 (FCC 60-1145; mimeo No. 9628), the Commission invited the parties to comment on the question in their proposed findings and conclusions.

2. Florida-Georgia contends that since no appeal was taken from the Commission's decision of August 31, 1956, granting its application, and since the Commission on its own motion took no action within the time provided for appeal, the decision became final and the Commission lost jurisdiction to reconsider it or to reopen the record; that action to revoke the grant may now be taken only pursuant to 47 U.S.C. 312;[29] and that because the instant proceeding has not been brought under the provisions of this statute, it is merely investigatory and cannot result in any action affecting the Florida-Georgia construction permit or license. While this party correctly recites the statutory provisions relating to the jurisdiction of the Commission, it ignores the inherent power of all bodies charged with the responsibility of adjudication to protect the integrity of their processes. The statutory scheme regulating the finality of the decisions of administrative agencies, such as the Federal Communications Commission, is analogous to the system of statutes and rules governing the finality of judicial judgments with respect to which it has been held that "* * * tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the

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[29] This provides for the revocation of station licenses or construction permits under stated circumstances, and establishes basic procedures to be followed in such cases.

institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always await upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246. While these remarks were addressed to a situation involving a Federal court, and it is obvious that administrative agencies are not possessed of the multitude of powers inherent in courts, with respect to the necessity of maintaining the integrity of their processes, the two classes of adjudicatory bodies are indistinguishable. The validity of this observation is buttressed by the sweeping generalization of the Court's language quoted above.

3. Thus, it would appear that, in the absence of any specific prohibition in the statutes, the limitation contained in 47 U.S.C. 312 is intended to apply in situations other than those involving tampering with the basic processes of the Commission; that the Commission has inherent authority to reopen records and reconsider decisions when questions of fraud in the procurement thereof are presented, irrespective of how long after their procurement the possibility of fraud is ascertained; and, therefore, that the Commission has authority to take such action as may be appropriate in this proceeding with respect to the outstanding license for the operation of television station WFGA-TV, which is now held by Florida-Georgia Television Co., Inc.[30]

4. Moreover, it is noted that if the instant case were to be treated as merely investigatory with a view toward determination of whether the facts developed merit a subsequent revocation proceeding under 47 U.S.C. 312, the possibility of the revival and comparative consideration of the appli-

[30] No consideration has been given to the situation in which the jurisdiction of the Court has been invoked through the filing of an appropriate appeal from a Commission decision, and such decision has been affirmed by the Court. The question of whether, in such a situation, the jurisdiction to reopen the proceeding would be in the Court or the Commission is not here presented.

cations of city of Jacksonville and Jacksonville Broadcasting Corp. would be obviated. Assuming arguendo that this record warranted conclusions adverse to Florida-Georgia and favorable to either of the other applicants, exclusive adherence to the procedures established by 47 U.S.C. 312 could not result in the rendition of justice as between the parties. In that the inherent power of adjudicatory bodies to reopen judgments tainted with fraud is not a creature of statute, but a flexible power numbering among its purposes the awarding of substantial justice, it cannot be contended successfully that adequate relief is available under the existing statute. *Hazel-Atlas Glass Co., supra.*

5. With regard to the first of the issues for determination, viz, whether any Commissioner who participated in the voting which resulted in a grant of the application of Florida-Georgia Television Co., Inc., should have disqualified hmself, it is here clearly established by competent evidence that Commissioner Richard A. Mack should have done so, for he rendered himself ineligible and legally unfit for such participation. His long-distance telephone conversations with Francis P. Conroy of Jacksonville, Fla., during February and March of 1956, upon the merits of the three applications, while the proceeding was sub judice before him and his associate Commissioners, constituted a negation of the most elementary concepts of fair adjudication and a deprivation of the rights of the applicants to a decision from a completely impartial tribunal based solely upon the evidence developed in the public record. It is without significance here that the off-the-record information Mack received from Conroy may have been meager, for he called him on these occasions for the sole purposes of discussing improperly, viz, ex parte, the merits of the competing applicants and of obtaining extra record matter as to their qualifications. Thus, the determination is here compelling that, in failing to observe the required standard of judicial detachment and in demonstrating that he was wholly oblivious to the fundamental concepts of due process and fairplay, Commissioner Mack should have disqualified himself from participating with his associate Commissioners in any deliberations concerning the merits of the

three applications and in voting upon them. There was no occasion for any of the other Commissioners to disqualify themselves from voting upon these applications; nor are they ineligible to participate in this remand proceeding. Commissioner Hyde's conversation with Miles H. Draper and Harlan L. Kays was confined to routine procedural matters unrelated to the merits of the case, and nothing is here shown to have transpired which might reasonably have aroused the Commissioner's suspicions as to his visitors' propriety. Similarly, Commissioner Lee's impartiality was not compromised by his two conversations with Cyril C. Spades. This is particularly illustrated by his summary dismissal of the man from his office when, on his second visit, Spades first hinted a preference among the applicants in the case. Obviously, contacts of this type, where the Commissioner is unaware of any ulterior motives on the part of his callers or where he immediately forbids any attempt to discuss the merits of the case, cannot be deemed to require his disqualification.

6. The conclusion as to Commissioner Mack's disqualification requires a determination that the Commission's grant to Florida-Georgia Television Co., Inc., adopted August 29, 1956, was void ab initio. The parties to the proceeding were entitled to judgment on their proposals by a panel consisting entirely of impartial Commissioners, and the disability of one member of that panel renders the decision a nullity. The fact that Commissioner Mack's vote was not vital to the decision, for absent his participation the result would have been the same by a three-to-two vote, does not alter this conclusion, as it is impossible to gage the effect his views may have had on his fellow Commissioners who believed that he shared their role of impartial adjudicators. *Berkshire Employees Association of Berkshire Knitting Mills* v. *N.L.R.B.*, 121 F. 2d 235.

7. It is also concluded that in any further proceedings to be had in connection with the subject applications, both the city of Jacksonville and Jacksonville Broadcasting Corp. are disqualified from consideration because of attempts by individuals identified with them to influence the Commission through methods outside the recognized and

public processes of adjudication. Florida-Georgia Television Co., Inc., on the other hand, is not shown by the evidence to be disqualified from further consideration and nothing in this record may be held to reflect adversely on its application.

8. It is clear that J. Dillon Kennedy, who was the city commissioner of Jacksonville most intimately concerned with the prosecution of its application in this proceeding, abandoned the recognized and public processes of adjudication when he retained the services of Miles H. Draper and gave him a carte blanche to "neutralize" supposed political pressures in Washington. The city of Jacksonville was represented of record by experienced and competent communications counsel well able to protect all of its interests through the public processes of adjudication. Draper's employment was solely for the sake of his supposed political influence, and the fact that he apparently had none to deliver does not mitigate Kennedy's purpose and intention in hiring him. Nor is Kennedy exculpated by the fact that his agreement with Draper was never reduced to specifics, viz, the identity of the persons Draper was to see and what he was to do. Whether this omission was due to a misplaced delicacy resulting in a reluctance to require Draper to make known his contacts, or to a naive assumption that there was a well-recognized procedure in such matters with which Draper might be expected to be familiar, Kennedy, in effect, gave Draper unqualified and unlimited authority to utilize off-the-record methods to affect the outcome of the Commission's decision. The mere employment of Draper, under these circumstances, was itself an improper attempt to influence the Commission's processes of adjudication, and the futility of the act is a tribute to Kennedy's inaptitude rather than his innocence. In reaching this conclusion, Draper's testimony has been, in essence, accepted, and Kennedy's conflicting testimony has been rejected. While the substance of the detailed testimony presented by Draper indicates a disregard of the basic proprieties of adjudicatory proceedings not calculated to inspire confidence in him as a witness, the circumstantial evidence of his activities in Washington, which would have been totally without motive absent some agree-

ment with Kennedy, lends support to his statements. On the other hand, Kennedy's actions in the matter, including his disregard of Draper's letters and telephone calls which would be expected to have inspired an investigatory response had he not entered into the agreement, in addition to his ultimate payment of Draper's fee, are wholly inconsistent with his denial of the agreement and render his testimony incredible.

9. While no other individual connected with the city of Jacksonville knew of or ratified Kennedy's activities, the city canont escape the legal onus of these activities which were undertaken in its behalf. The innocence of the majority of the individuals associated with the city does not furnish cause for excusing or for the condonation of Kennedy's acts, *WOCO, Inc.* v. *FCC,* 153 F. 2d 623. Therefore, although the matter becomes moot with the withdrawal of the city's applications, it must be concluded in any event that this applicant is disqualified.

10. James R. Stockton, on behalf of Jacksonville Broadcasting Corp., endeavored to utilize ex parte techniques to induce the Commission to exercise its ultimate decisional authority to adhere to the original instructions given its staff to prepare a decision upholding the grant contemplated by the initial decision of the hearing examiner, irrespective of the significance which might be drawn by the Commission from its analysis of the evidence and the exceptions of the competing applicants and oral argument thereon. In his own words, he attempted "to bring influence to bear upon the Commission * * * by means other than through the recognized and public processes of adjudication." While the only direct approach to a member of the Commission made at his behest was that of J. J. Daniel to Commissioner Mack, Stockton's expenditure of considerable sums of money to secure introductions to politically prominent individuals and organizations can only be construed as an attempt to establish a conduit for off-the-record representations of his position to members of the Commission. It must have been obvious to him that elicitation of the support of the individuals to whom he was introduced could avail him nothing unless such support was communicated to the Commissioners whose votes would de-

termine the matter, and it is concluded that he sought out these men in an effort to secure their intervention on his behalf with members of the Commission. That the attorneys whom he retained, as well as the people to whom they introduced him, declined to intercede with the Commission does not exculpate Stockton, for, as with J. Dillon Kennedy, supra, it is the attempt itself and not necessarily the success or failure thereof which compels the finding of disqualification. An individual who has done what he can to subvert the recognized and public processes of adjudication is not to be excused because of the incidental failure of his efforts to bear fruit.

11. In reaching the above conclusion, consideration has been given to Stockton's contention that he did not seek preference for his own application, but only endeavored to secure a decision untinged with prejudice to him, and that he acted in what he regarded as self-defense founded upon a belief that similar tactics were being employed by his opponents. Such factors do not operate to reverse the conclusion of disqualification, for conduct which itself is inherently unacceptable cannot be condoned because the motivation of the individual engaged therein may have been less culpable than that of others similarly engaged. Stockton's belief as to his opponents' activities was founded on unproven rumors and surmise. He too had available the services of experienced and competent counsel to advise him as to appropriate remedies in the event any factual foundation for his fears could be established. His resort to off-the-record attempts to influence the decision was tantamount to an abandonment of the rights he sought to obtain from the Commission on behalf of Jacksonville Broadcasting Corp. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580.

12. In light of the conclusion as to the disqualification of Jacksonville Broadcasting Corp., the pending petition of this party to amend its application, filed May 8, 1961, must be denied. The amended applicant would be composed of the identical interests as the original corporation, and the disability here found would apply with equal force to the partnership entity proposed by the amendment. It

would be an exercise in futility to find that good cause exists to permit the amendment of an application to specify an entity which would be ineligible to receive the grant.

13. As indicated, this record would not warrant conclusions adverse to Florida-Georgia Television Co., Inc. While a considerable volume of circumstantial evidence was adduced concerning persons associated, or purported to be associated, with this applicant, such circumstances could not support basic findings or conclusions reflecting discredit upon it except by an unwarranted exercise of conjecture and surmise. While the acts of certain individuals may be construed as not inconsistent with an attempt to influence the Commission ex parte, they are as easily consistent with the actions of honest men, and such circumstances cannot be held to overcome the averments of innocence by this applicant. Nor is there satisfactory evidence of any direct contact between a member of the Commission and any principal of Florida-Georgia Television Co., Inc. (As noted at footnote 28, not only is Commissioner Mack's statement to Congressman Herlong incompetent to prove contact with Mitchell Wolfson, but the facts of record as to the relationship of the two men tend to discredit Mack's allegation.)

14. The circumstantial evidence concerning several individuals less closely connected with Florida-Georgia Television Co., Inc., fails to establish (1) that they attempted to influence the Commission's decision by improper means; or (2) that they were motivated in their actions by the principals of Florida-Georgia. Thus.

(*a*) The letter written to Commissioner Mack by Randall Chase, in July of 1955, cannot here be held to have been more than an expression of an opinion by an interested citizen; but even assuming arguendo its impropriety, there is no evidence to indicate that it was inspired or requested by the author's friend, George H. Hodges of Florida-Georgia Television Co., Inc., or anyone identified with this applicant, or that any principal of Florida-Georgia was aware that the letter had been written.

(*b*) Lester W. Foley's conversations with Commissioner Mack cannot be held to have significance under the issues, for there is no acceptable evidence indicating that anything improper was discussed; nor is there any competent evidence of record tending to connect the fact of these conversations with an instigation on the part of Florida-Georgia Television Co., Inc. It is not entirely clear from the record when Foley's engineering firm received its contract for preliminary survey work on the Florida-Georgia tower, but even if it predated the grant of this applicant's construction permit, only by the exercise of conjecture could such a fact be taken to establish that the contract was in reality a reward for an ex parte approach to Commissioner Mack or any Commissioner. This record casts no valid doubt on Foley's testimony that his visits to Mack were on unrelated matters.

(*c*) While the attempt of Cyril C. Spades to discuss the merits of the case with Commissioner Lee is not to be condoned, the record is barren of evidence tending to demonstrate that Florida-Georgia Television Co., Inc., or its principals, caused or were aware of the incident. Spades' preference for this applicant was the result of a personal political aversion to seeing the grant awarded to an applicant headed by an individual active in the political party to which Spades was opposed, and it was not occasioned by solicitation.

(*d*) Since there is no acceptable evidence that Guy L. Simmons approached anyone in connection with this case, a useful purpose would not be served by consideration of the matters relating to his business dealings with Florida-Georgia Television Co., Inc. Nor would the ultimate determination of the issues herein be advanced by consideration of the evidence as to Msgr. Maurice S. Sheehy, whose activities are shown to have been confined to the service of assisting personnel of this applicant in securing interviews with appropriate naval officials, and of urging two of the applicants to reconcile amicably their differences to the advantage of both.

15. Although a vigorous and conscientious investigation of Florida-Georgia Television Co., Inc., as well as its principals and its associates, was conducted on this record, no evidence was adduced which by any reasonable adjudicatory standard might be deemed as meriting an adverse conclusion with respect to that applicant.

16. In summary, the primary conclusions herein are that the Commission's original decision released August 31, 1956, granting the application of Florida-Georgia Television Co., Inc., for television facilities in Jacksonville, Fla., and denying the applications of City of Jacksonville and Jacksonville Broadcasting Corp. for the same facilities, was void ab initio, for it was rendered by a panel which included a Commissioner who was disqualified to vote upon these applications. It is further concluded that the two entities whose applications were denied are disqualified from consideration of their proposals in any further proceedings, due to their attempts to influence the decisions by means other than through the recognized and public processes of adjudication.

17. There remains the question of the disposition of the television facilities here involved. Although, as indicated, the original grant in the proceeding is void, in light of the fact that no impropriety on the part of Florida-Georgia Television Co., Inc., the grantee, contributed to such determination, public interest, convenience, and necessity will be served by authorizing the continued operation of the facilities by this applicant, pending such final disposition as the Commission may deem appropriate.

Accordingly, *It is ordered,* This 9th day of April 1962, that unless an appeal from this initial decision is taken by any of the parties to the proceeding, or the Commission reviews the initial decision on its own motion in accordance with section 1.153 of the rules, the grant of a television construction permit to Florida-Georgia Television Co., Inc., as embodied in the Commission's decision released August 31, 1956 (FCC 56-800; mimeo No. 34118), *Is void, and it is hereby set aside;* that City of Jacksonville and Jacksonville Broadcasting Corp. *Are disqualified* from receiving a grant of their applications; and that the pending petition

of Jacksonville Broadcasting Corp., filed May 8, 1961, to amend its application, *Is denied;* and

It is further ordered, That the operating authority of Florida-Georgia Television Co., Inc., for television station WFGA-TV on channel 12, Jacksonville, Fla., is continued in effect, pending further order of the Commission.

APPENDIX D

Sections 402(b), (g), (h) and (i) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq., provide as follows:

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(g) Time of hearing; procedure.

At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 1009(e) of Title 5.

(h) Remand.

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(j) Finality of decision; review by Supreme Court

The Court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

Section 10(e) of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1009(e) provides:

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of

statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

(6116-8)